MCI Telecommunications Corporation
1801 Pennsylvania Avenue, NW
Washington, DC 20006
202 887 2048

Leonard S. Sawicki
Director
FCC Affairs

EX PARTE

June 6, 1997

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street NW
Washington, D.C. 20554

Re: CC Docket No. 96-115; CPNI

Dear Mr. Caton:

Today, Mary Brown, Frank Krogh and I met with Dorothy Attwood and Jeannie Su of the Common Carrier Bureau. The purpose of the meeting was to review MCI's position in this proceeding and clarify points made in our earlier filings. The attached list was used during the meeting and details the topics covered in our discussion. MCI also provided a decision of the United States Court of Appeals for the Ninth Circuit, also attached to this letter.

Please add this letter and the enclosed copy to the record of this proceeding.

Sincerely,

Leonard S. Sawicki

Attachments

cc: Ms. Attwood
Ms. Su

CPNI Issues

Meaning of Section 222(c)(1)

"Except ... with the approval of the customer, a telecommunications carrier that receives or obtains [CPNI] by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to [CPNI] in its provision of (A) the ... service from which such information is derived, or (B) services necessary to, or used in, the provision of such ... service, including the publishing of directories."

- Absent customer approval, 222(c)(1) only permits use of CPNI for the provision and marketing of service in same category. With customer approval, carrier may "use" CPNI itself or "disclose" it to any other entity.

- Legislative history and text show that restrictions intended to be applied within each carrier and between affiliates; "use ... or permit access to" CPNI only makes sense if referring to use of CPNI by carrier that already has it.

- Service" should be interpreted to mean "category of service;" "All local" and "all interexchange" should be categories around which the restrictions are framed. "Single bucket" makes no sense, since would eliminate 222(c) completely.

Approval/Written Authorization

"Approval of the customer" in 222(c)(1) requires explicit oral approval following notification informing customer of nature of request for approval and proposed use. (Approval could be part of same communication as, but still following, notice.) Implied or "opt-out" approval would be a sham; would effectively turn over all CPNI for use by carriers that already have most or all CPNI, snuffing out competition, in the same manner as single bucket approach.

Interplay of 222 and Nondiscrimination Safeguards

Where carrier may, but is not required to, disclose CPNI to another entity -- such as where customer gives oral approval to disclose or where other entity needs CPNI to initiate service, under 222(d)(1) -- carrier must treat all other carriers the same as its own affiliates, under 272(c)(1) and (e).

- BOCs are abusing their monopoly access to CPNI and other information by denying it to MCI on grounds that it is CPNI, whether or not (d)(1) applies.

- Section 272(c) and (e), as well as Sections 201(b) and 202(a), require that where carrier uses CPNI or discloses it to its affiliate under a particular approval process, same process should be followed in determining whether or not to disclose to third parties.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AT&T COMMUNICATIONS, INC., California; MCI TELECOMMUNICATIONS CORPORATION; SPRINT COMMUNICATIONS COMPANY L.P.,

Plaintiffs-Appellees,

v.

PACIFIC BELL; PACIFIC TELESIS GROUP; PACIFIC BELL EXTRAS; PACIFIC BELL COMMUNICATIONS,

Defendants-Appellants.

No. 96-16476

D.C. No. CV-96-01691-SBA

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Saundra Brown Armstrong, District Judge, Presiding

Argued and Submitted March 4, 1997
San Francisco, California

Before: REINHARDT, HALL, and THOMPSON, Circuit Judges.

Pacific Bell and its affiliates appeal from a preliminary injunction barring them from using and disclosing for purposes of their awards program the long-distance billing information they receive from plaintiffs AT&T, MCI and Sprint. We affirm.

On an appeal from a preliminary injunction, this court exercises limited review. We reverse only if the district court relied on an erroneous legal premise or abused its discretion. See Gregorio T. v. Wilson, 59 F.3d 1002, 1004 (9th Cir. 1995). We

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

do not review the underlying merits of the case, and we will not reverse simply because we would have arrived at a different result if we had applied the law to the facts of the case. See Caribbean Marine Services Co. v. Baldridge, 844 F.2d 668, 673 (9th Cir. 1988).

Applying this standard, we do not think the district court abused its discretion in finding that plaintiffs had shown a probability of success on the merits of their claims. The use and disclosure of the billing information for the awards program appear to breach the terms of the billing agreements between plaintiffs and Pacific Bell. This activity may well also violate the Telecommunications Act and constitute a misappropriation of trade secrets. In addition, the district court's finding that allowing Pacific Bell to continue using plaintiffs' billing information in its awards program could cause them irreparable harm was not clearly erroneous. As a result, the district court did not abuse its discretion in granting the injunction.

Pacific Bell argues that the district court misapprehended the law because 47 U.S.C. § 222(c)(2), part of the Telecommunications Act of 1996, would in effect bar all of plaintiffs' claims. Whether or not this contention has merit, plaintiffs do not appear to have relied on it specifically in the district court, and the district court does not appear to have considered it as a separate argument. As a result, we decline to address it on appeal. We note that determining whether and how subsection (c)(2) applies to this case may require additional factual findings that are more properly made in the district court

than in this court on a limited appellate record. Pacific Bell of course remains free to move the district court to modify or vacate its injunction on the basis of this provision.

We thus conclude that the district court did not misapprehend the law or rely on an erroneous legal premise. As a result, we AFFIRM the grant of the preliminary injunction.